Duane and Rajbanshi Obtain Insurer Victory at Massachusetts' Highest Court Concerning Whether Insurer Must Prosecute Insured's Counterclaim For Damages

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By James J. Duane, III, Scarlett M. Rajbanshi on June 28, 2017

James J. Duane, III and Scarlett M. Rajbanshi recently secured a victory on behalf of the firm's client, an insurance company, at the Massachusetts Supreme Judicial Court which ruled that the insurer is not obligated to prosecute its insured's counterclaim for damages. Mount Vernon Ins. Co. v. VisionAid, Inc., SJC-12142 (June 22, 2017).

The insurer issued an employment practices liability policy to a Massachusetts manufacturing company. The insured was sued for age discrimination by a former employee. The insured alleged that the former employee was fired for poor job performance, insubordination, and suspected misappropriation of company funds. The insured requested that the insurer fund the prosecution of a counterclaim against the former employee that would seek to recoup the funds misappropriated. The insurer, who agreed to defend the insured against the employee's age discrimination suit without a reservation of rights, declined to fund the prosecution of the counterclaim, arguing that the language of the insurance policy did not require the insurer to prosecute claims on behalf of the insured, and that Massachusetts' " in for one, in for all" rule does not require an insurer to prosecute claims on behalf of the insured as part of the insurer's duty to defend. The insured disagreed with the insurer's position, arguing that the counterclaim was necessary in order to provide a "full defense" to the employee's age discrimination claim.

The case was before the SJC on three certified questions from the U.S. Court of Appeals for the First Circuit (Duane and Rajbanshi had previously prevailed on behalf of the insurer at the U.S. District Court for the District of Massachusetts and the insured appealed). In a 5-2 decision, the SJC (Gaziano, J.) ruled that the insurer had no obligation to prosecute the insured's counterclaim under either the policy language or Massachusetts' "in for one, in for all" rule. In ruling in favor of the insurer, the SJC recognized that "... the written insurance policy[ ] required [the insurer] to 'defend' [the insured] in any claim 'first made against [it] during the Policy Period,' and no more." While the insured made numerous public policy arguments to support its position that the insurer should pay for the prosecution of the counterclaim, the SJC declined to do so and held "[w]here the language of an insurance policy is clear and unambiguous, we rely on that plain meaning, and do not consider policy arguments in interpreting the plain language." Furthermore, the SJC held:

To adopt [the insured's] interpretation would require us to read in a number of provisions that the parties did not include in the policy and, as the dissent puts it, place an additional duty on the insurer "[w]here the insured's defense is intertwined with a compulsory counterclaim, where any reasonable attorney defending that proceeding would bring such a counterclaim, and where the insured agrees that any damages awarded to the insured on that counterclaim

will offset any award of damages against the insured that the insurer is required to indemnify." Not only is this proposition found nowhere in the language of the contract, it would result in extensive preliminary litigation to determine what claims are sufficiently intertwined[.]

The SJC concluded that "[i]mposing such requirements where none was included explicitly is far beyond interpreting the language of the contract."

With respect to the "in for one, in for all" rule, the SJC held that this rule "… did not change the meaning of the word 'defend.'" The SJC again raised the concern that requiring an insurer to prosecute an insured's counterclaim "… would result in additional litigation in virtually every case involving insurance on whether a 'reasonable' attorney hired separately by (and paid by) the insured would file the counterclaim in the given circumstances." The SJC declared that it was persuaded by the following analysis contained in *Barletta Heavy Div., Inc. v. Travelers Ins. Co.*, No. 12-11193-DPW (D. Mass. Oct. 25, 2013) concerning if insurers were obligated to prosecute affirmative counterclaims on behalf of insureds:

an insured would have every incentive—and little disincentive—to file suit, knowing that it could reap the benefits of success—however unlikely—while transferring the costs of an otherwise predictably unsuccessful suit onto its insurer.

The decision was featured in two articles by the Law360 legal news publication on June 23, 2017 and June 26, 2017.

